89-1867

No. 89-_____

Supreme Court, U.S.
FILED
MAY 23 1990
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OREGON

Petitioner,

v.

JEFFREY SCOTT WAGNER,
STEPHEN LEWIS FARRAR, and
REYES MIRANDA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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QUESTIONS PRESENTED

In the sentencing phase of a capital case, conducted pursuant to a statutory scheme that requires a sentence of death if the jury finds the defendant committed aggravated murder deliberately and without reasonable provocation, and is likely to be dangerous in the future:

1. Does the eighth amendment require that the jury be specially instructed to consider any evidence the defendant relies on as "mitigating," even if the evidence is not relevant to personal culpability for the murder apart from its bearing on the statutory issues?

2. If a special instruction is required, does the eighth amendment also require that the instruction direct the jury that it is free to impose a sentence of less than death, without providing guidance or standards on how the jury is to consider defendant's "mitigating" evidence?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Oregon, respectfully prays that the Court issue a writ of certiorari to review the Oregon Supreme Court's judgments and opinions in the above-entitled criminal cases. Pursuant to Supreme Court Rule 12.2, petitioner files a single petition covering the three cases because the judgments were rendered by the same lower court and involve the same legal questions.

OPINIONS BELOW

The Oregon Supreme Court's opinions in all three cases were issued on January 11, 1990, and are reported as: *State of Oregon v. Jeffrey Scott Wagner*, 309 Or. 5, 786 P.2d 93 (1990); *State of Oregon v. Stephen Lewis Farrar*, 309 Or. 132, 786 P.2d 161 (1990); *State of Oregon v. Reyes Miranda*, 309 Or. 121, 786 P.2d 155 (1990). Because of the length of the opinions, petitioner has included them in a separate volume which accompanies the petition. The opinions are set forth as Appendices A, B, and C, respectively.

JURISDICTION

Jurisdiction to review the Oregon Supreme Court's judgments in these criminal cases is conferred on the Court by 28 U.S.C. § 1257(a) (1988). The appellate judgments were issued and became effective on February 24, 1990. The judgments are set forth in the separate volume containing the appendices as Appendix D (*State of Oregon v. Jeffrey Scott Wagner*); Appendix E (*State of Oregon v. Stephen Lewis Farrar*); and Appendix F (*State of Oregon v. Reyes Miranda*). On April 11, 1990, Justice O'Connor granted petitioner's protective motions to extend the time for filing the petition for writ of certiorari, to and including May 24, 1990. This petition is filed within the time prescribed by Justice O'Connor's order.[1]

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[1] As described in petitioner's motions, under Oregon practice, the appellate judgment becomes effective after the date of the decision. In these cases,

(Footnote continued on next page)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The eighth amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Oregon Revised Statute § 163.150 (1987) (in effect for defendants' trials and later amended as of July 24, 1989) provided in relevant part:

> (1)(a) Upon a finding that the defendant is guilty of aggravated murder, the court except as otherwise provided in subsection (2) of this section, shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to life imprisonment or death. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. If the defendant has pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence; however, neither the state nor the defendant shall be allowed to introduce repetitive evidence that has previously been offered and received during the trial on the issue of guilt. The court shall instruct the jury that all evidence previously offered and received may be considered for purposes of the sentencing hearing. This subsection shall not be construed to authorize the introduction of any

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the appellate judgments issued about six weeks after the decisions. To avoid any uncertainty or disagreement, petitioner on April 6, 1990, filed precautionary motions to extend the time for filing the petition for writ of certiorari to May 24, 1990 (90 days from the effective date of the judgments). These motions were designed to ensure that, if for any reason the decision dates were deemed to control the Court's jurisdiction, the Court's jurisdiction would be preserved.

evidence secured in violation of the Constitution of the United States or of the State of Oregon. The state and the defendant or the counsel of the defendant shall be permitted to present arguments for or against a sentence of death.

(b) Upon the conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;

(B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. In determining this issue, the court shall instruct the jury to consider any mitigating circumstances offered in evidence, including, but not limited to, the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed; and

(C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue considered.

(d) The court shall charge the jury that it may not answer any issue "yes" unless it agrees unanimously.

(e) If the jury returns an affirmative finding on each issue considered under this section, the trial judge shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted

> under this section, the trial judge shall sentence the defendant to imprisonment for life in the custody of the Department of Corrections as provided in ORS 163.105.
>
> (f) The judgment of conviction and sentence of death shall be subject to automatic and direct review by the Supreme Court. . . .

Shortly after the United States Supreme Court issued its June 26, 1989 decision in *Penry v. Lynaugh*, 492 U.S. ___, 109 S.Ct. 2934 (1989), the 1989 Oregon Legislative Assembly passed legislation amending Oregon Revised Statute § 163.150. The relevant amendment, Or. Rev. Stat. § 163.150(1)(b)(D) (1989), provides:

> (b) Upon the conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> . . . .
>
> (D) If constitutionally required, considering the extent to which the defendant's character and background, and the circumstances of the offense may reduce the defendant's moral culpability or blameworthiness for the crime, whether a sentence of death be imposed.

STATEMENT OF THE CASE

Each of the defendants in these three cases was sentenced to death for committing aggravated murder, and each sentence was automatically reviewed by the Oregon Supreme Court. Or. Rev. Stat. §§ 163.105 and 163.150 (1987).

Wagner's counsel, on direct review in the Oregon Supreme Court, conceded that Wagner did not offer any mitigating evidence at trial and that he was unaware of any mitigating evidence that could have been offered. (App. Br. 121). He argued, however, that Oregon's death penalty scheme was facially invalid under the eighth amendment, because it

unduly restricted the jury's consideration of evidence that might weigh in favor of a sentence of less than death.[2]

Relying on *Jurek v. Texas*, 428 U.S. 262 (1976), the Oregon Supreme Court sustained the facial validity of the scheme. The court held that eighth amendment requirements are satisfied if the jury is allowed to consider all competent mitigating evidence relevant to the three statutory questions the jury must answer in deciding whether to impose a death sentence. *State v. Wagner*, 305 Or. 115, 166, 752 P.2d 1136, 1168 (1988) (*Wagner I*). One of the dissenting judges agreed with the majority that the statutory scheme was facially valid, but concluded that a jury "must be permitted to choose a sentence less than death based on *any* mitigating circumstances, not just those that apply directly to a particular state's statutory criteria for death qualification." *Id.*, 752 P.2d at 1205 (Gillette, J., dissenting; emphasis original). That judge independently examined the record and found "mitigating circumstances" that he believed should have generated additional instructions. In particular, he focused on evidence that Wagner had attempted suicide in the past, had begun to have trouble with the law at an early age, had displayed mental instability throughout most of his life, had made some efforts to be employed, had "significant" artistic ability, and was of above average intelligence. *Id.*, 752 P.2d at 1210-11.

Wagner petitioned this Court for a writ of certiorari. (Pet. Cert., No. 87-6820). The Court granted certiorari, vacated the

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[2] The Oregon death penalty laws are modeled on the Texas death penalty statutes upheld in *Jurek v. Texas*, 428 U.S. 262 (1976). They limit the class of persons eligible for the death penalty to a narrow group of persons who commit certain types of aggravated murder. If a defendant is convicted of aggravated murder, a separate penalty hearing is held. A defendant is sentenced to death only if the jury unanimously gives affirmative answers to three statutory questions: was the murder deliberate; is defendant likely to commit criminal acts of violence in the future; was the murder reasonable in response to provocation, if any?

judgment and remanded the case to the Oregon Supreme Court "for further consideration in light of *Penry v. Lynaugh*, 492 U.S. ___ (1989)." *Wagner v. Oregon*, ___ U.S. ___, 109 S.Ct. 3235 (1987).

On remand, the Oregon Supreme Court consolidated Wagner's appeal with Farrar's and Miranda's appeals (then under advisement) for purposes of further briefing and argument in light of *Penry*. The state court specifically requested the parties to address whether there was mitigating evidence in each record that justified a so-called "fourth question"—*i.e.*, a further instruction directing the jury that it could impose a sentence of less than death on the basis of any mitigating evidence proffered by the defendant.

Wagner argued that the trial court should have given the jury a "fourth question." In support of his argument, he relied largely on the same evidence first identified in the state court's earlier dissenting opinion. Specifically, Wagner pointed to his two prior suicide attempts, his history of incarceration, his long history of substance abuse, his "significant" artistic ability, his education level, his attempts to better himself and remain employed, his hope at one time to marry, and his effort to seek mental health counseling after the break-up of a personal relationship. (Memo. in Resp. to Court's Questions, p. 9).

Farrar, too, claimed that evidence in his case justified a "fourth question." He relied, first, on evidence that he suffered as a child from a medical condition termed "precocious puberty." This condition caused him to grow abnormally fast, to be hospitalized several times, and to be placed in school classes with older children. Farrar also relied on evidence that he had an unstable childhood. His father suffered from mental illness and occasionally was violent; his mother suffered from multiple sclerosis. Eventually, Farrar's parents could not take care of their children, and Farrar lived in foster

homes and reform institutions, apart from his sister. Next, Farrar pointed to evidence that he had attempted suicide a few times, and that over the years, he had abused a variety of drugs. Finally, Farrar claimed to have artistic ability. (Memo. in Resp. to Court's Questions, pp. 8-10).

Miranda similarly claimed he was entitled to further instructions on mitigating evidence. His full discussion of the evidence was:

> Defendant showed remorse when the police said they were concerned about not finding the victim's body. Defendant's brother and his other acquaintances uniform[ly] described defendant as friendly and not a threat to others. According to defendant's brother, defendant has musical ability. Defendant can also draw portraits, two of which were introduced into evidence.

(App. Br. 182-83; Ans. to Court's Questions, p. 2).

The state argued that, given the mitigating evidence relied on by the defendants, the eighth amendment did not require a "fourth questior" in any of the cases. Under the eighth amendment, "mitigating evidence" is not a short-hand description for whatever evidence a particular defendant hopes may induce the jury to react favorably toward him. Rather, to be constitutionally relevant, the evidence a defendant relies on for a sentence of less than death must bear on traditional sentencing considerations pertaining to a defendant's future conduct and his culpability for the murder. In all three cases, the juries were given very broad instructions on "deliberateness" and on the range and type of mitigating evidence the jury could consider on the question of future dangerousness. In the state's view, the evidence each defendant relied on was relevant to the jury's sentencing decision, if at all, only for its bearing on the statutory issues (*e.g.*, future dangerousness). As a result, no further instructions

were constitutionally required in any of these cases. (State's Resp. to Court's Questions, pp. 48-79).

The Oregon Supreme Court, however, found an eighth amendment violation in each case. Without explaining its rationale or discussing the evidence in any of the cases, the court simply rejected outright the state's contention that mitigating evidence should causally relate to the murder in such a way as to bear on a defendant's culpability or blameworthiness for the crime. *State v. Wagner*, 309 Or. 5, 786 P.2d 93, 101; App-14 (1990) (*Wagner II*).[3] Instead, the court concluded that "all aspects" of a defendant's character and background are relevant to the sentencing decision. *Ibid.* In its decision, the court proposed an instruction that it believed the eighth amendment compelled:

> Should defendant receive a death sentence? You should answer this question "no" if you find that there is any aspect of defendant's character or background, or any circumstances of the offense, that you believe would justify a sentence less than death.

Id., 786 P.2d at 101; App-14.

The court explained that, through the proposed question, it was "asking the jury in making its finding to consider any mitigating aspect of defendant's life, alone or in combination, not necessarily related causally to the offense." *Id.* 786 P.2d at 101; App-15. *Accord*, *State v. Farrar*, 786 P.2d at 177-78; App-76-78; *State v. Miranda*, 786 P.2d at 130-31; App-97-98. The Oregon court's formulation of a proper instruction, therefore, deliberately omitted any reference to mitigation in terms of reduced moral culpability for the crime, rejecting not only the state's legal position, but also the

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[3] For the Court's convenience, petitioner cites to specific pages in the decisions below by providing parallel citations to the appendix as well as to the regional reporter.

express language the Oregon legislature adopted in response to the *Penry* decision. *Ibid.*; *see* Or. Rev. Stat. § 163.150(1)(b)(D), *infra* at p.4.

The Oregon Supreme Court in each case reversed the judgment as to the penalty phase and remanded for resentencing based on the procedures announced in *Wagner II*.

REASONS FOR GRANTING THE WRIT

The Oregon Supreme Court approached these three capital cases as if the records and the claimed mitigating evidence the defendants relied on were the same in each case. In fact, however, the amount and kind of mitigating evidence differed substantially. The evidence ranged from Wagner's admittedly non-existent, or at best negligible, showing, to the minimal showing in Miranda's appeal, to the somewhat greater quantum of mitigating evidence in Farrar's record. As the Oregon Supreme Court approached the eighth amendment issue, however, these differences were either insignificant in degree, or altogether irrelevant to the analysis. The state court declined to identify so much as a single shred of evidence in any of the three cases that the jury could not have considered meaningfully and fully under the statutory questions. Instead, so long as the defendants characterized some evidence as "mitigating," however slight its weight and tenuous its relevancy, the defendants were entitled to have a "fourth question" presented to the jury. The recommended "fourth question" that the Oregon Supreme Court fashioned, in turn, provided no guidance whatsoever on how or for what purpose the jury should consider evidence that it believes might weigh in a defendant's favor.

The impact of the Oregon Supreme Court's approach is two-fold. First, it promises to force a retrial of the penalty phase of every, or nearly every, capital defendant sentenced to death in Oregon prior to the *Penry* decision. There are

twenty-two of those defendants. To date, seven of their sentences have been vacated solely on the basis of the trial court's failure to give a so-called "fourth question" to the jury.[4] Reversal on this ground now appears automatic, and the giving of a "fourth question" in these and all future Oregon capital cases now appears mandatory. The state seeks review, in part, because the Oregon Supreme Court's analysis fails to provide any assurance that the costly process of resentencing in all or even some of these cases is constitutionally required.

As important, the Oregon court has embarked on a radically new course in death penalty cases, one purportedly compelled by the eighth amendment. Under it, jurors in capital cases receive no guidance for their deliberations in determining whether to impose a sentence of less than death. Instead, they may consider any aspect of a defendant or his life that they choose to consider, and they may weigh that evidence in a defendant's favor for whatever reason that evidence causes them to want to do so. This unquestionably is the broadest possible interpretation of the eighth amendment's requirements, one that mandates less guidance to a capital jury charged with making a life and death decision than would be provided to a civil jury in an ordinary tort case. Oregon seeks this Court's review so that it may know, before it conducts all future capital trials pursuant to the Oregon Supreme Court's new procedures, whether the eighth amendment compels the course the state court has charted.

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[4] In addition to the cases joined in this petition, *see State v. Moen*, 309 Or. 45, 786 P.2d 711 (1990); *State v. Montez*, 309 Or. 564, ___ P.2d ___ (decision issued April 3, 1990); *State v. Nefstad*, 309 Or. 523, ___ P.2d ___ (decision issued April 3, 1990); *State v. Smith*, 310 Or. 1, ___ P.2d ___ (decision issued May 10, 1990).

I. The Oregon Supreme Court Has Broadened the Scope of a Capital Jury's Penalty Phase Deliberations Far Beyond the Constitution's Requirements.

1. Beginning with its decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the Court has attempted to provide standards for a constitutional death penalty scheme that serve two central eighth amendment goals: first, application of the law with reasonable consistency; second, fairness to the accused through an individualized assessment of whether death is the appropriate punishment. *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982); *California v. Brown*, 479 U.S. 538, 544 (1987). These objectives inevitably compete with one another, creating what has been characterized as a "tension" between standards and discretion, *California v. Brown*, 479 U.S. at 544 (O'Connor, J., concurring), and calling on states either to risk that the death penalty will be irrationally imposed or to chance the opposite vice—*i.e.*, unduly constricting a sentencing authority's ability to consider the unique individual before it, *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct 2934, 2965 (Scalia, J., dissenting).

Some of that tension was resolved, albeit by a closely divided Court, in *Penry*. The majority in *Penry* concluded that a jury (or other sentencing authority) in a capital case must be able to consider all relevant mitigating evidence for whatever weight the jury might give it in determining whether death is an appropriate penalty. *Id.*, 109 S.Ct. at 2947-49. Accordingly, in states where the legislative scheme identifies specific mitigating factors for the jury to address, the eighth amendment requires a trial court to fashion special instructions directing the jury's attention to mitigating evidence relied or by an accused if that evidence has relevancy beyond the scope of the statutory considerations. *Id.*, 109 S.Ct. at 2948-52. In effect then, the Court concluded that a state's interest in confining a jury's deliberations to specific

sentencing policies must give way to a capital defendant's interest in having all mitigating evidence relevant to the sentencing decision fully considered by the jury, thereby ensuring an individualized sentencing decision.

Penry thus answered a significant issue for states administering capital punishment schemes. But in providing that answer, it raised an equally crucial and as yet unsettled question: what evidence is "mitigating" and "relevant" within the meaning of the eighth amendment? Must the evidence have bearing on some legitimate and articulable sentencing concern (*e.g.*, culpability for the murder)? Or may the evidence consist of anything that could cause a jury—or a single juror—to react favorably toward a particular defendant?

The Oregon Supreme Court gave the second answer. It held that a jury may consider "all aspects" of a defendant's life in the penalty phase, even those that have no logical connection to the murder for which a defendant is to be sentenced. *Wagner II*, 786 P.2d at 101, App-14. Also, the state court eliminated from its suggested instruction any reference to culpability or moral blameworthiness for the murder, and it declined to provide any other focus or guidance for the jury's consideration of "mitigating" evidence relied on by the defendant. *Wagner II*, 786 P.2d at 101, App-14-15. Thus, under the Oregon Supreme Court's approach, jurors are invited in the sentencing proceeding to consider and give effect to the evidence in whatever way and for whatever reason the evidence may cause them to impose a sentence of less than death.

Not surprisingly, then, the Oregon Supreme Court found it unnecessary to discuss the evidence that justified a so-called "fourth question" in any of these cases. Under the court's approach, any evidence would do, so long as defendant choose to rely on it as a basis for a sentence of less than death. Evidence with no logical bearing on culpability, no logical relationship to the murder, and no relevancy to the

statutory issues would warrant an open-ended jury instruction which would allow the jury to consider that evidence in selecting the punishment.[5] Similarly, even evidence that bears squarely on the statutory issues would justify a fourth, open-ended instruction because, conceivably, that evidence could cause some jurors to react favorably toward a defendant for reasons that are outside traditional sentencing considerations.[6] The Oregon Supreme Court thus erred on the side of interpreting the eighth amendment's requirements as broadly as possible, having once interpreted them too narrowly. *See Wagner I*, 752 P.2d at 1168 (holding that Oregon's scheme is constitutional so long as the jury is allowed to consider all competent evidence relevant to any of the three statutory questions).

2. Neither this Court's prior decisions, nor the principles underlying their holdings, support an approach that gives a defendant carte blanche to rely on evidence of whatever kind, weight or relevancy that will arguably play on a juror's emotions in some fashion. Nor does precedent or constitutional principle support an approach that directs a state to give so little guidance to a jury's sentencing deliberations.

To the contrary, traditional sentencing policies consistently have guided the Court in its eighth amendment decisions. In testing whether the death penalty may be applied to particular crimes or classes of offenders, the Court has looked

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[5] An example would be the taking of showers while incarcerated, discussed in *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986).

[6] For example, in sentencing someone who murdered a number of prostitutes serially, a juror might be inclined to consider the victims' worth in assessing the appropriate punishment, even though that consideration has no proper bearing on the sentence. *E.g., South Carolina v. Gathers*, ___ U.S. ___, 109 S.Ct. 2207 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987). With little or no guidance for the jury's deliberations, the potential for one or more jurors inappropriately to consider the victims' status as prostitutes in determining the sentence would be particularly great.

to whether the death penalty makes a "measurable contribution to acceptable goals of punishment." *E.g.*, *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). Foremost among these goals are retribution and deterrence of capital crimes by prospective offenders. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). In turn, the "heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987).

In deciding when a state's legislatively adopted capital sentencing policies must give way to allow broader sentencing discretion, the touchstone for the inquiry similarly has been personal culpability for the crime.

> Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

Penry, 109 S.Ct. at 2947 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)(concurring opinion)).

Thus, in *Penry*, where petitioner claimed that his crime was attributable to mental retardation and severe child abuse, the Court concluded that he constitutionally was entitled to instructions that clearly directed the jury to consider that evidence "as it bears on his personal culpability." *Id.*, 109 S.Ct. at 2949. The evidence Penry relied on, although it did not provide a legal excuse for his crime, was of a kind that

rationally could support a juror's conclusion that Penry was less "morally culpable" than defendants who have no similar excuse or explanation for their conduct. *Ibid.* The same focus—personal culpability for the crime—guided the decision in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), although it led to an opposite result. Franklin relied only on his good behavior in prison and failed to present any evidence that was relevant to "moral culpability beyond the scope of the special verdict questions." *Id.*, 487 U.S. at 185. Further instructions to the jury, therefore, were not constitutionally required. *Ibid.*

3. In sharp contrast, the Oregon Supreme Court held that the eighth amendment requires extending an open-ended invitation to juries to attach mitigating weight to any evidence whatsoever that a defendant may offer as the basis for a sentence of less than death. The consequences of that invitation are as unsound as they are constitutionally unwarranted.

In these cases, for example, the single common denominator of the "mitigating" evidence relied on by defendants was that each possessed some measure of artistic ability. Nothing in any of the records demonstrates that these defendants possessed extraordinary artistic talent; indeed, little evidence was presented at all about the extent of their artistic aptitude. But whatever their talents, that evidence had no bearing on any legitimate sentencing concern. Artistic ability, absent some direct connection to the murder, its circumstances or a defendant's future conduct, has nothing to do with culpability. If a juror conceivably could find that such a factor weighs in a defendant's favor, it would be for reasons having to do with conjecture, mere sympathy and similar emotions, rather than the reasoned moral inquiry into culpability that the eighth amendment requires. *See California v. Brown*, 479 U.S. at 543 (emotional responses should not play a part in the sentencing determination, even if they weigh in the defendant's favor); *Saffle v. Parks*, ___ U.S. ___, 110 S.Ct. 1257,

1264 (1990) ("fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror").

The dangers inherent in the Oregon Supreme Court's expansive approach are highlighted by the prospect of codifying a consideration such as "artistic ability" in a state's capital sentencing scheme. If artistic aptitude in the abstract (that is, apart from its bearing on a defendant's culpability) legitimately may be considered by a jury as a basis to decline to impose a sentence of death, then presumably a legislature categorically may exempt individuals with artistic ability from the reach of the death penalty law. But to suggest a state could do so strains all notions of responsible sentencing policy. In effect, a state would declare that as between two individuals who commit murder under equally aggravating conditions, with like mental states, both of whom are equally likely to be violent in the future, and both of whom are otherwise equally culpable for their crimes, one should live because she has some modicum of artistic ability, and the other should die because she does not. The constitutionality of such a scheme might well be open to question. At a minimum, such a criterion would not harmonize with traditional criminal law sentencing goals as reflected in the laws throughout this country, and it would be difficult to defend on any sound policy ground.

"Artistic talent" provides an obvious target for criticism, because it so plainly tells a jury nothing about culpability. However, other evidence may present a greater danger due to its potential to play on subtle biases and prejudices, while having some surface bearing on general character traits. For example, education level and employment history

seem benign enough, and a person's willingness to pursue an education or to strive to remain employed probably reveals something favorable about character even apart from its relevancy to potential rehabilitation. However, as the American Bar Association and other authorities in the area have cautioned, these are often class-related considerations that work against minorities and other disadvantaged social groups.[7] The risk of influencing the jury improperly is even more apparent with evidence such as religious devotion, political party affiliation or membership in mainstream service organizations. *Cf. Zant v. Stephens*, 462 U.S. 862, 885 (1983) (race, religion and political affiliation are among the factors that are constitutionally impermissible or totally irrelevant to the sentencing process).

The record in one of these cases, *State v. Miranda*, more tangibly demonstrates how a jury potentially could decide whether death is an appropriate sentence on the basis of considerations that simply should not influence the jury's discretion. Miranda was tried jointly with a co-defendant, Stephen Nefstad.[8] Miranda grew up in a hard-working Hispanic home, one that provided him a stable environment as a child, even if it did not offer him any particular advantages. Miranda pointed to little in the way of mitigating evidence as a basis for a sentence of less than death. He relied only on evidence that he cried for a few minutes when police questioned him about

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[7] *See generally* Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6, 15 (1983) citing AMERICAN BAR ASSOCIATION, TASK FORCE ON SENTENCING ALTERNATIVES AND PROCEDURES, SENTENCING ALTERNATIVES AND PROCEDURES 75-76 (2d ed. 1979) and Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1434-42 (1979).

[8] Because Miranda and Nefstad were jointly tried throughout the guilt and sentencing phases, the record in Miranda's case contains all of the evidence and arguments pertaining to his co-defendant. The Oregon Supreme Court vacated Nefstad's sentence on April 3, 1990. *See* n.4, *infra*.

the crime (arguably evidence of remorse); that his brother and acquaintances considered him friendly and non-threatening; and that he had some musical and artistic ability.

In contrast, the evidence suggested that the co-defendant, Nefstad, had been a model child raised in a fairly typical, white middle-class family with many of the advantages that such an upbringing normally entails. Nefstad had gone to good schools, had been an altar boy and had a paper route, and showed promise throughout his childhood of becoming a decent, responsible, law-abiding citizen. Nefstad's attorney argued to the jury that Nefstad was in many ways a very good person who was dangerous only when he was using alcohol and drugs. Although the jury was not expressly invited to compare Miranda's and Nefstad's background, the contrast was apparent. Nefstad looked more like "the boy next door" with whom jurors could identify. In contrast, Miranda's minority background could have made the jury less inclined to react favorably to him. Left with no more guidance for their deliberations than the Oregon Supreme Court would provide, a juror easily could be influenced on such an improper basis.

None of this is to argue that evidence of artistic ability, religious devotion, middle-class or minority-class background, or similar traits can never be admissible. It can be, so long as it is relevant to some legitimate sentencing consideration such as future conduct or personal culpability. Indeed, all of the defendants in these three cases were able to place before the juries all the mitigating evidence on which they hoped to rely, and they were able to argue that evidence freely.

The problem lies in providing a jury with some guidance for how it is to consider "mitigating" evidence in selecting a sentence. If a defendant's evidence logically bears only on the mitigating considerations expressly identified in a state's statutory scheme, then it should be enough for a trial court to

instruct consistently with those statutory sentencing policies. *E.g., Franklin v. Lynaugh, supra.* If a defendant relies on "mitigating" evidence that is relevant to culpability for the crime in ways that go beyond the questions the statute asks the jury to answer, then a court should "clearly direct the jury to consider fully [that] mitigating evidence as it bears on his personal culpability." *Penry*, 109 S.Ct. at 2949. However, divorcing the jury's consideration of "mitigating evidence" from legitimate sentencing goals, and directing jurors to consider that evidence fully without any guidance on how and for what purpose they should consider it, invites the jury to draw favorable inferences that are wholly unrelated to the goals of the sentencing scheme.

That danger is heightened by the reality that the sentence is affected if only one juror, rather than several or all twelve, gives favorable weight to any piece of evidence on which the defendant relies. For example, it may be unlikely that twelve jurors unanimously would agree that a defendant should not be sentenced to death because he has some artistic or musical ability, or was an altar boy, or suffered as a child from an unusual medical condition that was unconnected to his crime. But it is conceivable that such evidence could strike a sympathetic chord in a single juror; in turn, that single juror's belief that defendant should not receive a death sentence would then control the decision of all twelve jurors.[9]

Although the Oregon Supreme Court felt constitutionally constrained to grant jurors this license, the eighth amendment does not require it, and it may even forbid it. It is an open question whether such unguided and broad discretion runs

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[9] Under Oregon law, the jury must unanimously vote to impose a death sentence. Or. Const., Art. I § 40; Or. Rev. Stat. § 163.150(1)(b)(D). *Cf. McKoy v. North Carolina*, ___ U.S. ___, 110 S.Ct. 1227, 1233 (1990) (each juror must be permitted individually to consider and give effect to mitigating evidence).

afoul of the eighth amendment's command of reasonably consistent application of the death penalty, given that the class of individuals subject to the law is meaningfully narrowed. *See Penry*, 109 S.Ct. at 2951. But that challenge is as strong as it can be, where as here mitigating evidence with no particular connection to the crime is to be freely considered by individual jurors for whatever relevancy and weight they wish to attach to it.

II. Oregon, and Other States with Similar Sentencing Schemes, Need this Court's Clarification and Guidance.

As discussed at the outset, Oregon has twenty-two persons who were convicted of aggravated murder and sentenced to death prior to the Court's decision in *Penry*. Seven of those cases have, in *pro forma* fashion, been reversed solely on the basis that under *Penry* a "fourth question" was constitutionally required. The Oregon Supreme Court's reading of *Penry* makes it all but certain that, at a minimum, the remaining capital defendants sentenced prior to *Penry* will have their sentences similarly vacated. They will then be entitled to new penalty phase trials in which the Oregon Supreme Court's suggested instruction (or one very similar to it) must be given.

The Oregon Supreme Court's holding threatens to heavily burden Oregon's judicial system with retrials of nearly all Oregon defendants sentenced to death. To the extent that any of those defendants in fact were tried in a way inconsistent with the eighth amendment's requirements, Oregon stands ready to retry them with the full measure of protection the constitution affords. But to the extent that these retrials are not constitutionally required, the consequences of the Oregon Supreme Court's holdings are enormously wasteful. The overly broad legal principle the state court relies upon, coupled with the court's unwillingness to discuss or perhaps even examine the defendants' proffered "mitigating

evidence," provides no assurance that a retrial is constitutionally warranted in any of these cases.

More important, Oregon stands at a cross-road in the application of its death penalty scheme. That scheme has been in place for six years; a significant number of individuals have been tried, convicted and sentenced to death pursuant to a process that provides meaningful guidance for the jury's sentencing discretion. Prosecutions under Oregon's death penalty provisions continue and presumably trial courts will now instruct juries in compliance with the Oregon Supreme Court's decision in *Wagner II*. Thus, Oregon is embarking on a process in which capital juries will have no effective guidance on how they are to consider mitigating evidence in deciding whether to impose a sentence of less than death.

At a minimum, Oregon has an interest in knowing whether and to what extent its capital sentencing policies can be reconciled with the policies it follows in all other criminal sentencings. Oregon (like the federal government and many other states) has replaced a sentencing system based on broad discretionary considerations with a far more fixed and objective set of guidelines that control judicial sentencing discretion. Or. Rev. Stat. § 137.010 (1989) (requiring sentences imposed after November 1, 1989, to be in accordance with the rules of the State Sentencing Guidelines Board). It may be that the eighth amendment requires Oregon to forgo any attempt to guide sentencing discretion in capital cases, thus forcing it to be out of step with the rest of its criminal justice sentencing policies. But if that is so, that declaration should come from this Court, especially when the Oregon Supreme Court's approach may otherwise open Oregon's capital sentencing process to later challenges under both state and federal constitutional provisions. *See, e.g., Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)(states must channel the sentencer's discretion by "clear and objective standards" that provide

"specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death"); *State v. Freeland*, 295 Or. 367, 667 P.2d 509 (1983) (in criminal cases, Oregon Constitution requires discretion to be exercised consistent with standards that ensure predictable and uniform application of law).

Although the ink on the *Penry* decision is barely dry, lower courts already have begun to differ markedly in their understanding of when a capital defendant is entitled to have a jury directed to give more consideration to "mitigating" evidence than is afforded by a state's statutory sentencing policies. *Compare DeLuna v. Lynaugh*, 890 F.2d 720 (5th Cir. 1990) (capital petitioner failed to produce the "kind and quantum of mitigating evidence" that would even arguably bring him within *Penry*) and *Callins v. State*, 780 S.W.2d 176, 192-93 (Tex. Crim. 1986), *petition for cert. filed* (U.S. Apr. 17, 1990) (No. 89-7307) (mitigating evidence must be relevant beyond scope of statutory issues to require further instructions to the jury), *with Dobbs v. Zant*, 720 F.Supp 1566 (N.D. Ga. 1989) (*Penry* entitles defendant to rely on mitigating evidence without restriction).

The question remaining after *Penry*—what constitutes relevant and mitigating evidence for purposes of the eighth amendment—promises to be a difficult and divisive one for lower courts. Oregon has a large number of defendants sentenced to death whose cases will turn on the answer to this question. Other jurisdictions, such as Texas with several hundred individuals sentenced to death, similarly have a large stake in knowing the correct answer to that question sooner rather than later. Individually and collectively, the states have a compelling need for the Court's further guidance and clarification on the eighth amendment's requirements in this area.

CONCLUSION

For the reasons set forth above, the Court should issue a writ of certiorari to review the judgments and decisions of the Oregon Supreme Court in these cases.

Respectfully submitted,

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